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CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater

Report of the Secretary-General

Addendum

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II. COMMENTS AND OBSERVATIONS RECEIVED FROM STATES

A. General comments and observations on the draft

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

The United States of America is pleased to provide the following comments, which supplement those previously submitted by the United States on 28 June 1996, on the draft articles adopted by the International Law Commission (ILC) on the law of the non-navigational uses of international watercourses. These comments, which are more detailed than those presented in June of this year, are intended to help facilitate the Working Group's October 1996 deliberations on this important topic. To accomplish this purpose, this paper presents some specific textual suggestions on how the superb work of the International Law Commission might be further refined in a few respects.

C. Comments and observations relating to specific draft articles

PART I. INTRODUCTION

Article 1. Scope of the present articles

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

Scope of the Convention

The ILC commentary indicates that the drat articles were not intended to establish rules on the conservation and management of living resources (e.g., fish that occur in international watercourses). Indeed, had it been intended to cover the subject in the present instrument, the draft articles would have included numerous provisions setting forth how parties would regulate such activities. For example, agreements in this area typically have provisions on, among other things, the prevention of overfishing, minimization of by-catch and the promotion of maximum sustainable yield. Despite this intention, the conservation and management of living resources appears to fall within the current broad definitional scope of article 1, paragraph 1.

To clarify this issue, the Government of the United States suggests that an additional paragraph 3 be added to article 1:

"3. This Convention does not apply to the conservation and management of living resources that occur in international watercourses, except to the

extent provided for in Part IV and except insofar as other uses affect such resources."

Article 2. Use of terms

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

Application of the Convention to Parties

It is the assumption of the United States that the rights and obligations under this convention would apply between and among parties to the convention and would not extend to States that were not parties to it. A small drafting change to the definition of "watercourse State" would clarify this point:

"(d) Watercourse State means a State that is a party to this convention in whose territory part of an international watercourse is situated."

Article 3. Watercourse agreements

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

Watercourse agreements

In its 28 June 1996 comments, the United States noted that:

"The International Law Commission approach is to create a framework of principles that are essentially residual in nature and are subject to variation in particular agreements ...

"... [W]e will wish to review article 3 carefully, to ensure that it is clear that the new framework will not override existing cooperative arrangements, even where some issues dealt with in the International Law Commission articles are not also covered in the existing arrangements."

In this context, the Government of the United States notes that additional consideration might be given to article 3: (a) to include a provision clarifying the relationship of this convention to existing agreements; and (b) to accord wider scope for watercourse States, after the convention has entered into force, to adopt different rules for the use, conservation, and management of an international watercourse.

(a) Existing watercourse agreements

The current draft articles are silent on the relationship of the articles to pre-existing watercourse agreements. A large number of multilateral treaties contain provisions, known as "savings clauses", which describe the relationship of the multilateral treaty to other international agreements concluded by the parties. With respect to the use and regulation of international watercourses, a great number of existing international agreements allocate rights and responsibilities of parties. Where the relevant countries have concluded an agreement, except to the extent that such an agreement has an adverse effect on a watercourse State that is not party to that agreement, there would seem to be no reason for this convention to disturb the bargained-for exchange between or among the parties.

While it is clear that this convention should not alter the rights and obligations of watercourse States which arise from existing watercourse agreements, it is a more difficult question whether the convention should apply to the extent that an agreement regarding a watercourse or watercourses is silent on a particular issue (i.e., the extent to which this convention will fill lacunae in existing agreements). On the one hand, filling such lacunae may make sense if the parties to a particular agreement did not intend to create a comprehensive regime for regulating a watercourse. On the other hand, silence with respect to particular issues may reflect the bargained-for exchange of the parties (i.e., parties may have paid a price in an agreement for silence on a particular issue). Existing rules of treaty interpretation do not necessarily give a clear and comprehensive answer to whether this convention in any particular instance would be construed to fill such lacunae.

One approach that delegations might wish to consider would be a possible article under which each party to the convention could file a statement at the time it deposits its instrument of ratification, acceptance, approval or accession stating whether it intended for this agreement to fill lacunae in other agreements to which it was party.

(b) Future watercourse agreements

Scope of future agreements. Article 3 currently addresses some aspects relating to the conclusion of future agreements between and among watercourse States. Although as a matter of international law watercourse States should have wide latitude to apportion their rights and obligations in international agreements, paragraphs 1 and 3 of this article limit them to "apply[ing] and adjust[ing] the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof". This language could be modified to give parties more flexibility to enter into agreements that may apportion their rights and obligations in ways different from this convention.

Relationship of this convention to future agreements. Although article 3 generally discusses aspects of future agreements, it does not specifically prescribe a rule describing the relationship between watercourse States' rights and obligations under the convention and their rights as parties to agreements

concluded after becoming party to the convention. A rule could be set forth more clearly.

Future agreements that may harm other watercourse States. Article 3, paragraph 2, provides that watercourse States may enter into an agreement "provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse". Consideration might be given to whether the phrase "provided that" might be replaced with "to the extent that". This change would have the effect of only affecting the offending provisions of the bilateral agreement, rather than affecting the entire instrument.

(c) Drafting suggestions

Taking into account the issues described above, the United States suggests, for the attention of other delegations, a possible reformulation of article 3:

"Article 3

"Watercourse agreements

"1. This Convention shall not alter the rights and obligations of a watercourse State arising under other agreements in force on the date on which it becomes a party to this Convention.

"2. Watercourse States may enter into one or more agreements, hereinafter referred to as 'watercourse agreements', which alter, apply or adjust the provisions of this Convention in relation to the characteristics and uses of a particular international watercourse or part thereof. Subject to paragraph 3 of this article, unless such agreements provide otherwise, this Convention shall not alter the rights or obligations of watercourse States that arise from such agreements.

"3. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to any part thereof or a particular project, programme or use, [provided that the agreement does not adversely affect], [except insofar as the agreement adversely affects] to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

"4. Where a watercourse State considers that adjustment or application of the provisions of this convention is required, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements."

Article 7. Obligation not to cause significant harm

GREECE

[Original: French]

[8 October 1996]

The Government of Greece wishes to recall its position set forth in its previous observations on the draft articles as a whole. At this stage, it will confine itself to making a few additional comments concerning the new version of draft article 7.

That article was radically revised at the last minute by the International Law Commission. That revision has destroyed a balance, a genuine compromise, achieved with difficulty after several years' work. That compromise provided that the equitable and reasonable utilization envisaged in draft article 5 was utilization that did not cause significant harm to another watercourse State. That solution is simple, fair, clear and, above all, consistent with contemporary practice.

With the new version of article 7, the situation is completely different. There has been an uncalled-for change of criterion. Everything now depends on the notion, not defined in the draft articles and therefore vague and abstract, of "due diligence". Under the terms of this new proposal, a State can lawfully cause significant harm to other States of the same watercourse, provided that it confines itself within the limits of what article 7 calls "due diligence". Consequently, everything becomes imprecise and subjective. What now counts is the diligence exercised and not the significant harm itself, which is no longer the key factor. This new proposal clearly does not provide the necessary security that a codifying text should bring to inter-State relations.

For these reasons, the Government of Greece cannot accept this new version, and proposes that the previous version adopted on first reading should be reinstated.

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

General comments and observations on Part IV

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

Standard of care

Obligations in Part IV are expressed without explicit reference to the standard of care that would apply to watercourse States (e.g., due diligence, all practical measures, strict liability). In many instances, the ILC

commentary describes what the intended standard would be. Delegations may wish to consider whether the standard of care should be expressed explicitly in those articles.

PART VI. MISCELLANEOUS PROVISIONS

Article 29. International watercourses and installations in time of armed conflict

UNITED STATES OF AMERICA

[Original: English]

[7 October 1996]

International watercourses and installations in time of armed conflict

Article 29 of the draft articles provides that "[i]nternational watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules".

The ILC commentary describes the intended effect for this article:

"(1) ... The article, which is without prejudice to existing law, does not lay down any new rule. It simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works ...

"(2) The principles and rules of international law that are 'applicable' in a particular case are those that are binding on the States concerned. Just as article 29 does not alter or amend existing law, it also does not purport to extend the applicability of any instrument to States not parties to that instrument ..."

Despite this intention, the current draft could have two unintended consequences. First, the current passive voice formulation of the article (watercourses, installations, facilities and other works "shall enjoy the protection accorded by the principles and rules of international law ...") could be interpreted to impose obligations on a watercourse State that are derived from neither customary international law nor international agreements to which it is a party. Second, as article 29 would appear to create an obligation on watercourse States under this convention, it would also appear that the dispute resolution provisions in article 33 would, accordingly, apply to alleged law of war violations referred to in article 29.

Both issues could be addressed by placing the substance of article 29 in the convention's preamble, rather than in an operative paragraph. If this is not possible, article 29 might be redrafted slightly, as follows:

"Article 29

"International watercourses and installations in time of armed conflict

"Watercourse States shall observe their obligations under the principles and rules of international law applicable to them in international and non-international armed conflicts with respect to the protection of international watercourses and related installations, facilities and other works and shall not use such installations and facilities in violation of such obligations."

The United States also notes the statement in the commentary that "[o]f course, the present articles themselves remain in effect even in time of armed conflict ..." This statement does not fully address the complex issue of the effect of armed conflict on treaties. It also does not take into account instances in which there may be a conflict between this convention and the rules of armed conflict, such as the Geneva Conventions of 1949 and other relevant principles of customary international law.